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November 18, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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Re: **In the Matter of Amendment of Part 90 Concerning
the Commission's Finder's Preference Rules
Notice of Proposed Rule Making in WT Docket No. 96-199
Comments of Kelley Communications, Inc.**

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of Kelley Communications, Inc. are an original and four (4) copies of its Comments on the FCC's Notice of Proposed Rule Making in WT Docket No. 96-199.

Your are requested to date stamp the "S&R" copy of this filing and return it to the courier delivering this package. If any additional information is desired in connection with this filing, please contact the undersigned.

Respectfully submitted,



A. B. Cruz III

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Amendment of Part 90 Concerning the
Commission's Finder's Preference Rules

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WT Docket No. 96-199

To: The Commission

COMMENTS OF KELLEY COMMUNICATIONS, INC.

Kelley Communications, Inc. ("Kelley"), by its attorney and pursuant to Section 1.415 of the Federal Communications Commission's (the "FCC" or "Commission") Rules,^{1/} hereby respectfully submits its Comments in response to the Notice of Proposed Rule Making ("Notice") adopted in the above-referenced proceeding^{2/} in which the Commission proposes to eliminate the finder's preference program in the 220-222 MHz band and is also seeking comment on the utility of the finder's preference program for private land mobile radio services authorized for the 470-512 MHz, 800 MHz and 900 MHz bands.

I. INTRODUCTION

Kelley is a licensee and operator in the 800 MHz specialized mobile radio ("SMR") service and is a party to twelve (12) finder's preference program cases currently pending at the Commission. In each of those cases, Kelley has submitted evidence which it believes demonstrates the violation of certain FCC SMR station construction and/or operation rules by the

^{1/} 47 C.F.R. § 1.415 (1995).

^{2/} Notice of Proposed Rule Making, WT Docket No. 96-199, FCC 96-383 (released September 27, 1996).

station's licensee, the nature of which, pursuant to the Commission's rules, resulted in the automatic cancellation of the station license. Kelley is seeking preferences with respect to certain frequencies authorized to those SMR stations. As an SMR station licensee/operator and finder's preference program participant, Kelley has a vested interest in this proceeding and standing to comment on the proposals contained in the Commission's Notice.

The Notice proposes to eliminate the finder's preference program in the 220-222 MHz band in connection with the FCC's proposals in PR Docket No. 89-552 to implement geographic area licensing and use competitive bidding -- i.e., spectrum auctions -- to choose among mutually exclusive initial applications. The FCC's proposal to eliminate the finder's preference program in the 220-222 MHz comes as no surprise to Kelley, especially given the FCC's earlier decision to eliminate (or freeze) the finder's preference program applicable to the 800 MHz and 900 MHz special mobile radio ("SMR") services to make way for the auction of spectrum in those bands.

Kelley firmly believes that spectrum auctions -- notwithstanding the FCC's attempts to provide opportunities for "small businesses" to participate in the auctions -- has and will continue to contribute to the demise of many small, incumbent operators in the various radio services. Usually lacking the resources necessary to participate in spectrum auctions and given the broad territorial licensing rights typically accorded spectrum auction winners, small service providers have few, if any, options when faced with the need for additional channel capacity in order to grow their businesses and compete in the market place against auction winners and their ability to establish wide-area networks.

Kelley recognizes that spectrum auctions have become and will likely remain the FCC's primary licensing mechanism, and is prepared to deal with their impact on a going forward basis.

However, what continues to concern Kelley is how pending proceedings and applications -- including the many finder's preference requests now on file at the Commission -- will be handled in conjunction with the FCC's zealous pursuit of "available" frequencies for its spectrum auctions. Particularly disturbing is the Commission's apparent eagerness to adopt new rules, practices and policies, and then apply them retroactively just to expedite the auctions and ensure the highest possible financial gains. It is for the foregoing reason that Kelley feels compelled to participate in this proceeding and submit the following comments to address a specific proposal contained in the Notice.

II. COMMENTS

Beyond simply proposing to eliminate the finder's preference program in the 220-222 MHz band, the Notice contains a proposal which, if adopted, would give the Commission unfettered discretion to dismiss, without consideration, those finder's preference requests now pending at the Commission. Specifically, in Paragraph 11 of the Notice, the Commission proposes "to retain the discretion to dismiss pending finder's preference requests for any services in any frequency bands in which we decide to eliminate the finder's preference program as a result of this rulemaking proceeding." (Emphasis added). The broad language and lack of specificity in the foregoing provision raises serious concerns that the scope of the FCC's proposal might be interpreted -- and adopted -- to include the FCC's right to arbitrarily dismiss, without consideration, pending finder's preference requests, not only in the 220-222 MHz band, but those in the 800 MHz and 900 MHz SMR bands as well. Indeed, the language in Paragraph 11 of the Notice does not specifically limit the FCC's discretion to dismiss pending finder's preference

requests to those in the 220-222 MHz band.^{3/}

Kelley is deeply concerned with and troubled by the FCC's proposal to dismiss pending finder's preference requests in order to facilitate the FCC's spectrum auction process. The FCC's justification for its proposal to dismiss pending finder's preference requests is entirely disingenuous and blatantly ignores the extensive efforts expended by hundreds of "finders" who, at the FCC's urging and in good-faith reliance on the FCC's rules, went out and identified violations of the FCC's station construction and operation rules. The Commission is obligated to decide each of the pending finder's preference requests on their merits. To apply the proposed rules retroactively by dismissing pending finder's preference requests without consideration would be entirely unjust.

In support of its proposal, the FCC states in its Notice that "it may not serve the public interest to grant any pending finder's preference request" and claims that "persons with finder's preference requests on file would not be substantially harmed [by having their finder's preference request dismissed] because there would be an opportunity to apply for the unused frequencies once they become available for licensing." It is clear from the foregoing, that the FCC is overlooking the significant amounts of time, effort and resources that many finder's preference program participants have expended. It is worth reminding the FCC that it was the FCC itself who urged parties to identify "warehoused" frequencies and other licensee violations of the

^{3/} Kelley notes that in recent conferences between Kelley's communications counsel and the FCC staff, only "unofficial" oral assurances were offered by the staff that the language in Paragraph 11 of the Notice is intended to apply only to the 220-222 MHz band. Moreover, the FCC declined several requests that it issue written clarification of its dismissal proposal, even though such action would undoubtedly have helped minimize the level of confusion that surrounds this issue.

FCC's station construction and operation rules, and prepare and file corresponding finder's preference requests.

As noted above, Kelley currently has twelve (12) finder's preference requests on file with the FCC. Each of these requests were prepared and filed in full compliance with the FCC's rules then applicable to the finder's preference program. The preparation and filing of each one of these requests required Kelley to expend a significant amount of time, effort and resources, including, for example, the hiring of numerous professional land surveyors and communications engineers to conduct station site inspections and electronically monitor assigned frequencies for multiple extended durations. Despite these time-consuming efforts, Kelley's finder's preference requests have languished at the Commission for, in most of the cases, several years, and now the FCC has the audacity to suggest that it might simply dismiss them out of hand. Such action would be repugnant to even the lowest standard of decency, fairness, or justice.

From Kelley's perspective, it would be totally unfair and contrary to the public interest for the Commission to arbitrarily dismiss any valid finder's preference request and refuse to award an earned preference, only to capitalize on the finder's efforts by taking the unused frequencies and making them available for auction. Notwithstanding the FCC's claim, finders who "lose" preferences as a result of FCC dismissal actions would be substantially disadvantaged by having to participate in spectrum auctions in attempt to win rights to frequencies that they would have otherwise been awarded through the finder's preference program. It would be similarly inequitable for the Commission to allow licensees who have violated the FCC's station construction and operation rules to retain the unused frequencies identified by finders.

Although Kelley understands that the elimination of the finder's preference program in

the 220-222 MHz, 470-512 MHz, 800 MHz, or 900 MHz bands may be necessary to facilitate the agency's plans to implement geographic licensing and initiate competitive bidding in these bands, it would be wholly improper and unfair for the Commission to simply ignore the finder's preference requests that were legitimately and properly filed under the Commission's rules, and that remain pending only because of the Commission's own inability or reluctance to process them. In this regard, it seems ironic that in its Notice, the Commission, on the one hand, applauds the utility of and benefits derived from the finder's preference program, and then, on the other hand, appears overly eager to turn its back on the program as if it never existed. The fair and equitable thing for the Commission to do is to protect the vested interests of legitimate finder's preference program participants, and to ensure that any rule, practice, or policy adopted as a result of this proceeding be applied only prospectively.

CONCLUSION

For the reasons set forth above, Kelley strongly urges the Commission to refrain from adopting any rule, practice or policy that would give the agency unfettered discretion to arbitrarily dismiss finder's preference requests that are currently pending at the Commission. Any rule, practice or policy adopted in this proceeding should be applied only prospectively. The many finder's preference program participants who, like Kelley, adhered to the Commission's rules and filed their requests in reliance of those rules, have earned the right to have their requests considered and decided on their merits.

Respectfully submitted,

KELLEY COMMUNICATIONS, INC.

By: 

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